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CITATIONS

Case:

United States v. *Maloney*, 262 F. 2d 535 — 11

Constitution of the United States:

Fifth Amendment — 10

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 134

DAVID NAMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (R. 48)[1] is reported at 301 F. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1962. The petition for a writ of cer-

[1] The record on file in this Court, consisting, *inter alia*, of the printed appendices to the briefs in the court of appeals as well as the opinion of that court, will be cited herein as "R." We are filing a typewritten transcript of the trial proceedings which will be cited as "Tr."

tiorari was filed on May 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, along with Mr. and Mrs. Kahn, was charged with violation of the wagering tax laws. On the morning of petitioner's trial, the Kahns pleaded guilty. In his opening statement to the jury, the prosecutor indicated his intention to call the Kahns as witnesses (Tr. 4):

> Also, I have reason to believe that there will be testimony by a husband and wife that they did accept wagers as agents for [petitioner], that he was in fact their principal, and that he did not merely pick up slips from them on which they had accepted wagers, but I have reason to believe they will testify that he would settle with them each day on the accounts, on the bets, that they had taken the previous day.

Thereupon, defense counsel, who represented the Kahns as well as petitioner, advised the court and the prosecution that he had not waived any of the constitutional privileges of the witnesses and that they were entitled not to testify. Subsequently, the government called the Kahns as witnesses and, on the advice of counsel, each pleaded the privilege against self-incrimination to certain of the questions asked. The court suggested a preliminary examination out of the hearing of the jury but defense counsel failed to respond to the suggestion. No protective instruction was requested either at the time the witnesses refused to answer the prosecution's questions or as part of

the court's charge to the jury. In charging the jury, the court, *sua sponte*, stated (Tr. 102):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

No objection was taken to the instruction in the trial court or in the court of appeals, and the petition makes no reference to it.

The *sole question presented by petitioner* is whether the government was precluded from calling the Kahns as witnesses by the knowledge that it was likely that each would plead the privilege against self-incrimination.

There lurks in the record the further question whether the trial court's instruction with respect to the inferences which the jury might draw from the Kahns' refusal to testify was not only erroneous but so prejudicial to the substantial rights of petitioner that the judgment should have been reversed by the court of appeals despite petitioner's failure to raise an objection in the trial court or to point out the error on appeal.

STATEMENT

Petitioner was charged in a two-count information with wilful failure to pay the special wagering occupational tax and with wilful failure to register prior to engaging in the wagering business (R. 4).

After a trial by jury, petitioner was convicted under both counts (R. 40). He was sentenced to imprisonment for a period of four months and fined the sum of $1,000 (R. 1).

No question is raised regarding the sufficiency of the evidence, which may be summarized as follows: On March 19, 1960, a United States Marshal and several Internal Revenue Service agents, carrying arrest and search warrants, arrested petitioner in his home (R. 44). They found three undated number pool wager slips (the copies customarily retained by the bookie) and $186.34 in his pockets (R. 21, 24, 45). They also found in his home a quantity of daily double horse-wagering slips, half-price pool cards used in a number pool betting operation and papers covered with number pool bets. Most of these papers were undated. Also seized in the house were three bundles of currency totalling $700 and two envelopes containing $75 and $50 (R. 45-46, 24-27).

Prior to petitioner's arrest, his daily activities had been observed by Internal Revenue Service agents. He was seen making morning and afternoon daily visits in Chelsea, Massachusetts, to variety and smoke shops reputed to be engaged in bookmaking (R. 18-19). On one occasion, when an agent was standing in a smokeshop, petitioner told its counterman that he would wait until the agent left (R. 20-21). Upon his arrest, petitioner admitted that he was aware of the registration and tax requirements of the federal wagering statute but denied that he was a bookie or liable for these taxes (R. 44-45).

The issues in this case arise out of the government's calling of Irving and Annette Kahn, husband and wife, as witnesses. The Kahns had been charged with substantive wagering tax violations and were represented by the same attorney as petitioner. On the day of petitioner's trial, the Kahns had pleaded guilty (R. 1-3). In his opening statement, the prosecutor related that he had reason to believe a husband and wife would testify that they accepted wagers as petitioner's agents and that petitioner in turn daily picked up wagering slips and settled the previous day's betting accounts with them (R. 4). When this statement was concluded, defense counsel stated at a bench conference that he understood that the prosecution was going to attempt to use the Kahns as witnesses. He asserted that "they are entitled not to testify in their own case" and that "I didn't waive any Constitutional privileges in their behalf" at the time they had pleaded guilty. When the court pointed out that the privilege against self-incrimination ceased upon their guilty pleas, defense counsel answered that their income taxes were under investigation by the Internal Revenue Service. The court replied that it would rule upon the claims of privilege, if made, when the witnesses took the stand (R. 6-7).

The government called Mrs. Kahn as it first witness (R. 7). A defense objection "to the use of this witness" was overruled (Tr. 7). After she testified that she and her husband were the proprietors of a variety store in Chelsea and had known the petitioner for two years "by sight," she was asked if they had some type of business relationship with petitioner. She

replied: "Our attorney advised us not to answer on the plea of the Fifth Amendment." Defense counsel then added, "[t]he defendant [sic] refuses to answer on my advice" (R. 7). The court ruled that the witness could be compelled to testify concerning the crime to which she pleaded guilty but would not be required to testify to anything that might convict her of conspiracy to commit that crime or that might convict her of other crimes. The court allowed defense counsel to consult with the witness and authorized him to signal the assertion of the privilege upon her behalf by simply rising in his chair (R. 8-13). Government counsel asked seven additional questions concerning the period of time the witness had operated the variety store and her knowledge of the federal wagering statute. All were answered without a claim of the privilege. When a defense objection based upon materiality was sustained, the questioning of the witness was terminated (R. 13-17).[2]

At this point government counsel informed the court that he would be unable to use the Kahns as witnesses and that they both might be excused (R. 15-16). Upon the court's suggestion that the government might make a mistake in excusing them, counsel revised his views and concluded that he "would just as soon proceed with both of them and see what [he] could do" (R. 16-17). After introducing the balance of his evidence other than the testimony of the Kahns, the prosecutor asked the court to adjourn the case to await a memorandum

[2] The government did not recall Mrs. Kahn to the stand.

on this issue. The judge adjourned the case until the next morning, remarking that he did not think that the prosecution could convince him that Mrs. Kahn could be compelled to testify if she said that an answer might incriminate her (R. 30):

> * * * If she says the evidence might incriminate her, I have got to go along with her.
>
> Probably, if I doubted her, I could examine her in private.

The next morning, without objection from petitioner, the court granted the government permission to call Mr. Kahn as a witness (Tr. 70). Mr. Kahn testified that he operated a variety store and knew petitioner. He stated, after the court overruled his refusal to answer on "advice of counsel," that he did not accept wagers and that he had had some dealings with petitioner in February and March 1960. The court then sustained the witness' refusal to relate the details of these dealings (R. 30-31). At this point, after the court overruled Mr. Kahn's refusal to answer whether he ever took bets in his variety store, defense counsel asserted, "I guess he is misinterpreting my standing up, your Honor." (R. 31). In a bench conference which followed, defense counsel referred to the signal arrangements established when Mrs. Kahn had testified. The judge replied that he would instruct the witness whether to answer and that no further signals should be given (R. 31). Mr. Kahn then testified that he had taken bets. He refused to answer whether he had been paid a commission on these bets. Upon being required to answer concerning the frequency of petitioner's visits, the witness stated

that petitioner came to his store a couple of times a week. He denied that petitioner made daily visits, twice a day (R. 32). The following then ensued (*ibid.*):

> Q. Who did you accept the bets for that you took in your variety store?
> A. I refuse to answer.
> THE COURT: I will sustain that. Next question.
> Q. Did you ever take bets for the defendant David Namet?
> THE COURT: I will sustain an objection to that.

No further questions were asked by the prosecution and the defense did not cross-examine the witness (R. 32).

Petitioner did not testify. In his defense, his son testified that his father was retired and ran errands around town. He said that the wagering slips and other papers seized from petitioner's home had been there for years in a cigar box. He claimed that the source of the money found by the agents was an insurance policy (R. 33-35).

In his summation, government counsel did not refer to the refusal of the Kahns to testify. In its instructions, the court charged, *inter alia* (R. 37):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Thereafter, the court, in its review of the evidence, made no mention of the Kahns but told the jury to decide the case on the evidence (R. 38-39). At the

conclusion of the charge, the court stated: "If there are any requests for further instructions, or I will now see counsel for any suggestions of errors or omissions" (R. 39). At the bench conference which followed, defense counsel did not object to the portion of the charge which related to the Kahns, although he did take an exception to another part (R. 39-40).

On appeal from his conviction, petitioner urged eight grounds for reversal, including a claim that the trial court erred in permitting, over petitioner's objections, the Kahns to testify, "knowing in advance that they would plead the Fifth Amendment" (Appellant's Brief, p. 1). Although petitioner attacked portions of the court's charge to the jury, his brief to the court of appeals made no reference to the instruction concerning the inferences which might be drawn from the Kahns' refusal to testify. The court of appeals affirmed the conviction, *per curiam*, stating (R. 48):

> An examination of the record discloses no error warranting vacation of the judgment below.

ARGUMENT

1. There is no merit to petitioner's sole contention—that the trial court erred in permitting the government to call the Kahns as witnesses when it had advance notice from their counsel (who was also counsel for petitioner) that each was likely to claim the privilege against self-incrimination. It is clear from the record that the Assistant United States Attorney acted in good faith in calling the witnesses

and that the trial court was careful to protect the rights of petitioner when the privilege was invoked (see Statement, *supra*, pp. 5-8).

The Kahns had pleaded guilty to wagering tax violations grounded in their relationships with petitioner. They were thus in a position to give valuable testimony for the government. In light of their guilty pleas, the Fifth Amendment, if claimed, might not support a refusal to answer all questions pertinent to the charges against petitioner. It was therefore proper for the court to permit the government to call the witnesses so that questions might be posed and rulings obtained, if the privilege was claimed. In fact, each of the witnesses, when called, freely answered several questions and when Mr. Kahn claimed the privilege as to others, he was only partially sustained and was required to answer a number which were clearly pertinent. Petitioner raises no issue here with respect either to the rejection of the claim of privilege or the admissibility of these answers. Nor does he attempt to justify his claim—which we believe unsound—that the notice of an intention to assert the privilege is sufficient to deny to the government evidence to which it is concededly entitled.

If petitioner believed that the invocation of the privilege by the Kahns would prejudice him, he had ample means of protecting himself. He could have requested a preliminary inquiry outside the presence of the jury to demonstrate that the witnesses would assert the privilege under oath and to identify the questions to which such claims would be asserted

and the extent to which such claims would be sustained by the trial court. In fact, the court suggested such a procedure prior to the appearance of Mr. Kahn (R. 28-30; see Statement, *supra*, p. 7), but defense counsel never responded to the suggestion. Had petitioner availed himself of this right, there would have been no refusals to answer in the presence of the jury and no possibility of the prejudice claimed. His failure to do so could not deny the government the right to call the witnesses or render the exercise of that right error. As an alternative means of protection, petitioner could have requested —but did not—a cautionary instruction following the claim of the privilege and as part of the court's charge to the jury.

Under the circumstances, we submit that the rulings of the trial court in permitting the government to call the Kahns as witnesses were correct. Nor do these rulings conflict in any way with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Maloney*, 262 F. 2d 535, which, if anything, approved the government's right under such circumstances to call these persons as witnesses.

2. There is a second issue presented by the record, although not raised by petitioner in the trial court, in the court of appeals or in his petition for a writ of certiorari. Upon conclusion of the presentation of the evidence and the arguments of counsel, the court instructed the jury in part as follows:

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would

> appeal to you as having a direct bearing upon the defendant's guilt.

This instruction, in our view, was mistaken insofar as it allowed the jury to draw any inference "bearing upon the defendant's guilt" from the fact that "the Kahns refused to testify." However, petitioner, who was represented by experienced counsel of his own choice, failed to object and to afford the trial court an opportunity to correct the matter. In addition, although eight different contentions of error were argued on appeal to the court of appeals, petitioner failed to raise any question with respect to this portion of the charge either in his brief or on oral argument. Finally, petitioner has failed to raise any question with respect to the instruction in his petition in this Court.

It is entirely possible that the court of appeals considered this specific portion of the charge but, having in mind petitioner's failure to raise the point by way of exception at the trial or assignment of error on appeal, decided that the error did not affect any of petitioner's substantial rights when viewed in the light of the arguments to the jury, the contents of the entire charge and the strong circumstantial evidence of guilt. On the other hand, there remains the possibility that petitioner's failure to point out the error resulted in its going unnoticed. For this reason we would not object to this Court's granting certiorari, if petitioner so requests, for the purpose of remanding the case to the court of appeals in order that that court may indicate whether it has ruled on the question and, if not, may determine

whether the apparent error in the charge requires reversal of the conviction despite the failure to raise the point and the strong evidence of guilt. The question does not merit the time and attention of this Court.

CONCLUSION

For the reasons stated, the government would not object to the grant of certiorari if petitioner requests a remand to the court of appeals so that it may determine whether the apparent error in the charge requires reversal of the conviction.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JULY 1962

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